

The ABCs of SUPs

The Ins and Outs of Special Use Permits

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Statutory Authority

- An authorization to use land in a way which is permitted by zoning, subject to requirements designed to assure that the proposed use
 - is in harmony with zoning
 - will not adversely affect the neighborhood if the requirements are met.
- Also know as “special exceptions” or “conditional uses”

- General City Law §27-b
- Town Law §274-b
- Village Law §7-725-b

A Zoning Tool which adds Flexibility

- Some uses, while allowed, present challenges that need special attention in order to lessen the impact of these uses upon the area.
- Listing a use as one allowed by SUP is tantamount to a legislative finding that, assuming the requirements have been met, the use is in harmony with the zoning plan and will not adversely affect the neighborhood and surrounding area.

■ North Shore Steak House, Inc. v. Board of Appeals of the Incorp. Village of Thomastown



Use Variance vs. Special Use Permit

- A use variance is required in order to use land for a purpose NOT allowed by the zoning regulations.
- It is not listed as a permitted use in the district.
- A special use permit is for a use that IS allowed by zoning.
- It is listed as a permissible use subject to additional requirements.



Site Plan vs. Special Use Permit

Site Plan Review

- Use reflected in design
- Need not be part of zoning law
- Looks at layout and design of parcel
- Public hearing not required by state law (Unless review is by a ZBA)
- Performance bond or security agreement allowed
- Goal is good design

Special Use Permit

- Use only allowed at a particular site under certain requirements
- Part of Zoning
- Looks at compatibility with neighboring uses
- Public hearing is required
- No authority to require a performance bond or security agreement
- Goal is harmony

Reviewing the Permit:

Look to Your Zoning Law
or Ordinance



What should happen to this application?

- Scenario 1: Planning Board reviews and approves a SUP for a use not mentioned in the zoning law.
 - Solution: Building Official should deny the building permit, which would allow the applicant to go to the ZBA for an interpretation of whether the use is allowed.
- Scenario 2: Planning Board wants to stop projects from appearing on its agenda for a uses it doesn't believe are allowed.
 - Solution: Prior to putting the SUP request on the agenda, require the zoning enforcement officer to determine whether the use is listed as a use subject to special use permit. Don't put on agenda if not listed. If applicant disagrees, can appeal decision to ZBA for an interpretation.

Is the Use Allowed?

- List type of allowed uses
 - Use should be clear, perhaps even defined in the law
 - List uses, not "or similar uses"
 - Some general categories can be too broad (ex. Retail)
 - Example: sit-down restaurant, take-out restaurant, restaurant with drive-thru window
- Identify locations where special uses may be allowed
 - By Zoning Districts – Example: gas stations are allowed by special use permit in commercial districts
 - By Overlay Districts – Can narrow uses from those allowed in underlying district
 - Example: No gas station in watershed overlay area, even if in commercial district.

Who Reviews Applications?

Governing Board can retain authority to review or delegate some or review of uses to:

- Planning Board
- Zoning Board of Appeals as "original" jurisdiction
- Other authorized board

If the Governing Board retains authority:

- Does not need to articulate standards to guide its decision. (Cummings v. Town Board of New Castle)
- However, the governing board must act reasonably. (Lemir Realty Corp. v. Larkin)

*Once
delegated,
board
decisions
are not
appealed to
Governing
Board*

What Standards Apply?

- Once SUP authority is delegated, it must be accompanied by standards/criteria to guide the board's decision.
- If there are no standards/criteria, the board's decision may be invalidated by the courts.
- *Tandem Holding Corp. v. Board of Zoning Appeals of the Town of Hempstead*
- *Carlstein v. Zoning Board of Appeals of the Town of Union*

❖ **General standards will usually be upheld, but it is better to be more specific than "in the consideration of public health, safety and welfare."**

Examples of Requirements or Standards

Application of Standards

- General: All listed uses must provide adequate traffic, safety and lighting improvements
- Specific: There shall be no internal illumination of any sign



Specificity of Standard

- General: A dumpsters must be provided and screened from view
- Specific: A dumpster must be provided that blends into the architecture of the building



Uses Requiring Special Treatment

Religious & Educational Uses:

- These institutions presumptively serve the public's welfare and morals (*Cornell Univ. v. Bagnardi*)
- Requires reasonable accommodation

Mining:

- Municipality can regulate non-mining aspects (i.e. location) of a mining operation. (*Schadow v. Wilson*)
- If mine meets size threshold for state permit, local review is limited to certain subjects allowed by the statute.



Procedural Basics

- Public Hearing must be held within 62 days from receipt of application
- Notice must be mailed to the applicant & county (if GML 239-m triggered) within 10 days of the hearing
- Notice must be published in newspaper of general circulation at least 5 days prior to the hearing
- Decision must be made within 62 days after close of hearing
- Decision must be filed with municipal clerk within 5 business days after decision is rendered
- Board must comply with SEQRA. If an EIS is required then the timelines are adjusted for the EIS process.

How does SEQRA apply?

The Review Board must:

- 1) Require an EAF to be submitted with the application
- 2) Make a determination of significance.
 - a) If a negative declaration, SEQRA is done.
 - b) If a positive declaration, application not complete until a draft EIS has been accepted for public review.
- 3) Decide whether to hold a hearing on the DEIS along with the hearing already required. If yes, 14 day notice requirement must be followed
- 4) Complete the SEQRA process before making a final decision on the site plan application.

Ability to Waive Requirements

- Requires authorization by governing board
- Reviewing board must determine that the requirement is not necessary in the interest of public health, safety or general welfare or is inappropriate to the particular SUP.
 - Submission requirements
 - Permit requirements in SUP section of zoning



Sidewalk to nowhere?



Granting the permit

- Reviewing Boards have the discretion to determine if special use requirements have been met.
- If requirements are met the special use permit must be granted.
 - Pleasant Valley Home Construction v. Van Wagner
- Permit may be granted if environmental impacts identified through SEQRA are mitigated to the Board's satisfaction
 - Board must make required SEQRA findings prior to making a decision on the permit

Conditions

- Review board has express statutory authority to impose conditions which relate to the impact of the development on the land itself.
 - Old Country Burgers v. Town of Oyster Bay
- Example: Gas station in a SR-1 district is permitted where the size and layout would not adversely effect the neighborhood.
 - Permit conditioned on adequate parking, drainage and lighting

Limits on Conditions

- Should NOT relate to the internal operations of the activity on the premises
- Should not relate to a non-zoning purpose
- Regulating hours of operation has been viewed by the courts as an attempt to regulate the internal operations or details of a business
 - Board can regulate hours IF authorized to by local law/ordinance AND board can show with substantial evidence that restricting the hours of operation relates to the physical use of land.
 - See article on DOS website at <http://dos.state.ny.us/cnsl/lgops.html>

Denying the Permit

Denial must be based on reasonable grounds

- Make findings that show why the permit was denied.
Without findings, court could overturn decision as arbitrary and capricious.

Reasons for denial need to be supported by substantial evidence and not be arbitrary and capricious

- Use not desirable at a particular location
- Inadequacy of on-site parking
- Depreciation of property
- Increased traffic beyond impact of permitted uses
 - Pleasant Valley Home Construction v. Van Wagner
 - YMCA v. Burns



The Wrong Reasons for Denying the Permit

- Community opposition/pressure
 - Chernick v. McGowan
 - Tandem Holding Corp. v. Board of Zoning Appeals of the Town of Hempstead
- General objections to the use as undesirable.
 - Holbrook Assoc. Development co. v. McGowan
 - Example: Even though listed as allowed by SUP, bar denied because of undesirable late hours, litter, odors, etc.
- Applicant is in violation of unrelated permit or has a previous violation record



Who gets the permit?

- The Special Use Permit is attached to the LAND and not to the applicant - special use permit are not personal to the owner.
 - Dexter v. Town Board of the Town of Gates
- A fundamental principle of zoning is to regulate the use of land and not the person who owns or occupies it.
 - Weinrib v. Weisler

Temporary Special Use Permits

- Board needs specific authorization in the zoning law/ordinance to make a special use permit temporary.
 - Scott v. Zoning board of Appeals of the Town of Salina
 - S.V. Space Development Corp. v. Town of Babylon Zoning Board of Appeals
- Purpose should be to allow the Board to re-appraise the application in light of the facts and circumstances existing at the time of expiration.
 - Dun-Hill Realty Corp. v. Schultz
 - Cell tower example: Operator must prove the tower is still necessary for the service grid.

Renewable Permits

- If the application for renewal is subject to the same review as a new application, the reviewing board cannot deny the special use permit if the applicant has met all the requirements and conditions.
- However, if there have been changes in the factual circumstances or in the standards for review, then the board can reach a different decision.

Revoking a Permit

- A SUP may be revoked for noncompliance with the imposed conditions
- Reviewing board may revoke the special use permit if substantial evidence shows that the applicant failed to comply with the conditions imposed.
 - Persico v. Incorporated Village of Mineola
- Permit holder is entitled to a hearing prior to revocation

Enforcement

- Authorize the code enforcement officer to enforce the special use permit conditions
 - Could be stated in SUP law or in zoning statement of CEO/ZEO duties
- Require that approval conditions must be met to the extent practicable prior to the issuance of a building permit



Appeals

Decisions of the Reviewing Board are appealed to the Supreme Court in an Article 78 proceeding



ABCs of SUPs (Special Use Permits)

Case Citations

In order of appearance on slides:

1. North Shore Steak House, Inc. v. Board of Appeals of the Incorp. Village of Thomastown, 30 N.Y.2d 238 (1972).
2. Cummings v. Town Board of New Castle, 62 N.Y.2d 833 (1984).
3. Lemir Realty Corp. v. Larkin, 11 N.Y.2d 21 (1962).
4. Tandem Holding Corp. v. Board of Zoning Appeals of the Town of Hempstead, 402 N.Y.2d 388 (1977).
5. Carlstein v. Zoning Board of Appeals of the Town of Union, 71 A.D.2d 768 (3d Dept. 1979).
6. Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986)
7. Schadow v. Wilson, 191 A.D.2d 53 (1992).
8. Pleasant Valley Home Construction v. Van Wagner, 41 N.Y.2d 1028 (1977)
9. Old Country Burgers v. Town of Oyster Bay, 160 A.D.2d 805 (2d Dept 1990).
10. Pleasant Valley Home Construction v. Van Wagner, 41 N.Y.2d 1028
11. YMCA v. Burns, 13 A.D.2d 1009 (1961).
12. Chernick v. McGowan, 238 A.D.2d 586 (2d Dept 1997).
13. Tandem Holding Corp. v. Board of Zoning Appeals of the Town of Hempstead, 402 N.Y.2d 388 (1977).
14. Holbrook Assoc. Development co. v. McGowan, 261 A.D.2d 620 (2d Dept 1999).
15. Dexter v. Town Board of the Town of Gates, 36 N.Y.2d 102 (1975).
16. Weinrib v. Weisler, 27 N.Y.2d 592 (1970).
17. Scott v. Zoning board of Appeals of the Town of Salina, 88 A.D.2d 767 (4th Dept 1982).
18. S.V. Space Development Corp. v. Town of Babylon Zoning Board of Appeals, 256 A.D.2d 471 (2d Dept 1998).
19. Dun-Hill Realty Corp. v. Schultz, 53 A.D.2d 263 (2d Dept 1976) (citing Matter of Goodwin).
20. Persico v. Incorporated Village of Mineola, 261 A.D.2d 407 (1999).

Additional Citations:

1. Garcia v. Holze, 94 A.D.2d 759 (2d Dept 1983).
2. (Johnson v. ZBA of Amityville) (1993) unreported)